

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.5266 OF 1989

For Approval & Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether reporters of local papers may be allowed to see the judgment ?
  2. To be referred to the reporters or not ?
  3. Whether their lordships wish to see the fair copy of the judgment ?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any order made thereunder ?
  5. Whether it is to be circulated to the Civil Judge?

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SURESH BHAGWATSINH & ANR.  
VERSUS  
JAMNAGAR MUNICIPAL CORPORATION

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Appearance:

MR DM THAKKAR for petitioners  
MR JR NANAVATY for respondent

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Coram: MR.JUSTICE S.K. Keshote,J  
Date of decision: 04/04/2000

C.A.V. JUDGMENT

#. The petitioners in the special civil application

prayed for following reliefs:

(A) Your Lordships be pleased to issue a writ of mandamus or any other appropriate writ, direction or order and be pleased to quash and set aside the decision of the respondent authority to hold the petitioners as unauthorised occupant and/or unauthorised encroacher on the land situated admeasuring 34.41 sq.mts. opp. S.T.Depot, Jamnagar and further be pleased to quash and set aside the decision of the respondent authority to recover the amount of Rs.7,06,913/= from the petitioners towards the amount of use rent and damages for the period between 1979-80 to 31.3.1989 and also be pleased to quash and set aside the notice dated 29.5.1989 at Annexure 'B' to the petition and proceedings in pursuance thereof;

(B) Your Lordships be pleased to direct the respondent authority, its agents and servants not to take any further proceedings in pursuance to the notice dated 29.5.1989 at Annexure 'B' to the petition and not to disturb the possession of the petitioners from the hotel situated opposite S.T.Depot, Jamnagar in any manner, pending the admission, hearing and final disposal of this petition;

(C) Your Lordships be pleased to grant such other and further reliefs, as are deemed fit, in the interest of justice.

#. The learned counsel for the petitioners admit that after filing of this special civil application the petitioners have been removed from the site in question.

#. The petitioners filed Regular Civil Suit No.481 of 1979 in the court of Civil Judge (S.D.), Jamnagar for declaration and permanent injunction restraining the respondent from pulling down their construction and dispossessing them from the land in question. In the suit, the petitioners have also made application ex.5 and the learned trial court has granted ad-interim relief as prayed for. The petitioners filed another Regular Civil Suit No.538 of 1979 in the same court for declaration and permanent injunction restraining the respondent from disconnecting the water supply and refusing to supply water to the business premises of petitioners. In this suit also, application has been filed by petitioners at ex.5 for grant of temporary injunction. Temporary injunction was granted by the trial court.

#. The respondent has challenged the orders passed by the trial court in two suits below ex.5 by filing appeal before the District Court, Jamnagar. The appeal was allowed and interim relief granted by trial court was vacated. The petitioners preferred civil revision application No.489 of 1980 and No.490 of 1989 before this court. Both these civil revision applications came to be decided by this court on 7.3.83 and the same were allowed.

#. The learned counsel for the petitioners admit that both the suits have been decided by the trial court. However, he very fairly submitted that though he has no positive instructions, in the facts of this case, it appears that in Regular Civil Suit No.481 of 1979, the court would not have granted declaration and injunction as prayed for by petitioners.

#. I fail to see any justification in the approach of the petitioners not to bring on record the orders passed by the court in two regular civil suits. Mr.D.M.Thakkar, learned counsel for the petitioners submitted that he has received only instructions that suits have been disposed of from his counter part in the trial court but not the orders. Even it has not been disclosed on what date the suits have been disposed of. I find from the facts of this case that the suits filed by petitioners are dismissed or decided against the petitioners earlier to 29th May 1989. Under the notice dated 29th May 1989, the Corporation demanded from the petitioners to make payment of Rs.7,06,913/= for damages or mesne profit for use and occupation for the period 1979-80 to 31st March 1989. This notice has been challenged by petitioners in this special civil application.

#. The prayer made in the special civil application by petitioners for quashing and setting aside of the decision of the Corporation as contained in the aforesaid notice whereunder the petitioners were held to be unauthorised occupants and/or unauthorised encroachers on the land in dispute cannot be accepted on two grounds. Firstly, the suit filed by petitioners to declare them tenant or in lawful possession of the land in dispute has already been dismissed by the trial court. Once this decision has been given by the trial court, it becomes final and on the same facts and for the same relief, the petitioners cannot file this special civil application. This special civil application to that extent is barred by principles analogous to the Order 2 Rule 2 Civil Procedure Code. Otherwise, there will be no finality to

the litigation. Only after the decision of the suit filed by petitioners, the Corporation has taken this action. On merits, otherwise also, the learned counsel for the petitioners has failed to make out any case. It is contended that the petitioners are the tenants of the suit land and in support of this claim, reliance has been placed on two documents. One is at page No.29 and another is at page No.30 of the special civil application. Both these documents are of no value and substance. The first document has been issued by Food Inspector and he is not officer empowered to give the land on lease or rent to the petitioners. In fact, this appears to be a document which is procured by petitioners with connivance of this employee of the Corporation. Same is the case with second document. Such receipt can be obtained from the Corporation by unscrupulous litigants. Section 29 of the Bombay Provincial Municipal Corporations Act, 1949, makes a provision how the land of the Corporation is to be leased out or give on rent. For lease and rent of the land of the Corporation, the competent authority is Commissioner of the Corporation. The learned counsel for the petitioners has failed to produce any document, i.e. lease deed or rent note under which this land has been given to the petitioners on lease or rent. In the absence of such document it is difficult to believe what to say to accept the plea of the petitioners that they are tenants of the Corporation. Moreover, it is a disputed question of fact and when the petitioners have lost in the suit, it is not permissible to them to raise this plea in this special civil application.

#. So far as demand of Rs.7,06,913/= is concerned, it is true to contend by learned counsel for the petitioners that without notice and opportunity of hearing this demand cannot be raised. Where demand has been made it is expected of the Corporation to follow the basic principles of natural justice. But only on this ground whether this notice has to be quashed and set aside is a larger issue. It is no more res-integra that merely on breach of principles of natural justice in passing of the order impugned in the writ petitions, the court may not quash and set aside the same unless it is satisfied that the litigant has plausible, cogent and justified defence. In the case in hand, the petitioners are unauthorised occupants of the land in dispute and leaving apart that they are liable to be dispossessed from the land in question they are under legal obligation also to pay the damages or mesne profit for unauthorised occupation or encroachment. The petitioners remained in occupation of this land for about ten years and the market rate as per

the Government Resolution is to be recovered and that is what it has been done under the notice. Once it is accepted that the petitioners are encroachers or in unauthorised occupation of the land of the Corporation, the amount by way of damages or mesne profits are to be awarded in favour of the Corporation. For this, reliance placed by respondent on the Government Resolution cannot be said to be illegal or arbitrary or unjustified. The amount of damages or mesne profit to be recovered from the petitioner has been determined on the basis of Government Resolution to which no exception can be made.

#. In the facts of this case, the matter needs not be remanded back to the authority to pass fresh order. In the special civil application the petitioners have failed to make out what is the prevalent rate of lease or rent in the area of land. It is a matter where the petitioners, to avoid this payment of damage amount of mesne profit, are adopting dilatory tactics and filing civil suits and civil revision application before this court indiscriminately. Once the civil court accepted the petitioners to be in unauthorised occupation or encroachers on the suit land, the amount of damages or mesne profit are to be awarded in favour of the Corporation. The petitioners have not given out what reasonable sum should have been awarded to the respondent as damages or mesne profit for this long unauthorised occupation of the land by petitioners. If we go by substance of the matter and the fact that the petitioners are trespassers of the land of the Corporation, a reasonable balance has to be drawn in between substance of the matter and technical plea of breach of principles of natural justice made in passing of the impugned order. Where substance prevails over the technical plea of breach of principles of natural justice, the courts are to give way to the substance over the technical breach of principles of natural justice. It is a case where the petitioners have used the land of the Corporation and now they do not want to pay anything to the Corporation. Whatever the amount received by the Corporation are to be used for the purpose of development of the city and providing civic amenities to the residents within the limits of the Corporation. If in this way the persons are being permitted to encroach upon the Corporation land and enjoy the same without paying a pie, it is ultimately detrimental to people at large. It is not case of money of the Corporation but it is people's money for which the courts are to take all care and precautions.

##. As a result of aforesaid discussion, I do not find any merits in this special civil application. In the

result, this special civil application fails and the same is dismissed. Rule discharged. Interim relief earlier granted by this court stands vacated. The petitioners are directed to pay Rs.2,000/= as costs of this petition to the respondent-Corporation.

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(sunil)